

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

17 Cr. 686 (LAK)

JAMES GATTO,
MERI CODE,
CHRISTIAN DAWKINS,

Oral Argument

Defendants.

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New York, N.Y.
February 15, 2018
9:45 a.m.

Before:

HON. LEWIS A. KAPLAN,

District Judge

APPEARANCES

GEOFFREY S. BERMAN
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Southern District of New York

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STEVEN A. HANEY, SR.
Attorney for Defendant Dawkins

1 (Case called)

2 MR. DISKANT: Good morning, your Honor, Edward
3 Diskant, Noel Solowiejczyk, Eli Mark, and Aline Flodr for the
4 government.

5 MR. SCHACHTER: Good morning, your Honor, Michael
6 Schachter, Casey Donnelly, David Angeli on behalf of Mr. Gatto,
7 who is present in court.

8 MR. MOORE: Mark Moore and James Bernard for Mr. Code.

9 MR. HANEY: Good morning, your Honor, Steve Haney on
10 behalf of Christian Dawkins.

11 THE COURT: Good morning.

12 Mr. Schachter.

13 MR. SCHACHTER: Thank you, your Honor.

14 THE COURT: You may proceed.

15 MR. SCHACHTER: Your Honor, this is, at minimum, an
16 extremely unusual case. I'm unaware of any circumstances in
17 which the Department of Justice has sought to criminally
18 prosecute people for wire fraud for conduct which a federal
19 Court of Appeals has squarely said does not constitute wire
20 fraud.

21 The Seventh Circuit's decision in *United States v.*
22 *Walters* is indistinguishable from this fraud theory. The
23 theory there, your Honor, was a defendant was charged with
24 making payments to student athletes under circumstances which
25 the government claims would have violated NCAA rules and,

1 therefore, the government claimed that universities for which
2 those students played, they were giving scholarships to
3 students that were, in fact, ineligible to play, and that was
4 the government's fraud theory. The Seventh Circuit Court of
5 Appeals examined that fraud theory and said that is not wire
6 fraud.

7 Exactly in the face of that decision by that federal
8 Court of Appeals the Justice Department said, we are going to
9 pursue that same theory, in any event.

10 If anything, your Honor, this set of facts, this
11 theory is even far more flawed than was the theory that the
12 government attempted to pursue in *Walters*. I say that for two
13 reasons. First, *Walters* was not acting at the request of and
14 for the purpose of assisting the universities for which those
15 students played.

16 THE COURT: The indictment in this case says that it
17 was a necessary object of the conspiracy to conceal from the
18 universities what was going on, right?

19 MR. SCHACHTER: It states that that was part of the
20 fraud. Where I part company with your Honor is that it does
21 not say that that was the purpose of the fraud.

22 THE COURT: Who said a purpose? It was a part of the
23 conspiracy.

24 MR. SCHACHTER: It was part of the conspiracy, I
25 submit, your Honor, that the first two paragraphs of this

1 indictment described what the purpose was of this alleged --

2 THE COURT: I should just ignore everything else in
3 the indictment, right?

4 MR. SCHACHTER: Absolutely not. That's not my
5 suggestion. But in analyzing whether something constitutes
6 wire fraud the defendants must be acting with the purpose to
7 injure. That's what the Second Circuit said in *Regent Office*
8 *Supply*. Paragraphs 1 and 2 describe plainly what the purpose
9 was of this activity. The purpose was to assist the
10 universities in recruiting winning basketball teams.

11 THE COURT: Let me put this to you. I'm not saying
12 this is what happened. I'm just posing a hypothetical. Let's
13 suppose that a coach had a contract that gave him a million
14 dollar bonus for achieving a particular winning record. Define
15 winning record in some way, some objective way. And the coach,
16 for the purpose of assembling a team that, in his estimation,
17 would get him the million dollar bonus from the university,
18 entered into this conspiracy to have the other defendants pay
19 bribes to particular players, concealed those activities from
20 the university and that his purpose was to get the million
21 dollars. I mean it might have been good in the sense that
22 everybody at the university loves a winning team and all that
23 good stuff. Let's just assume that.

24 Would it be your position that an indictment alleging
25 those facts would not state a crime?

1 MR. SCHACHTER: That would be my position. First and
2 foremost, it still runs afoul of *Walters*, which is, you need to
3 have -- the scheme must be to take money out of the pockets of
4 the victim and transfer them to the pockets of the defendant.
5 That's what the United States Supreme Court said in *Skilling*.

6 THE COURT: A conspirator. Why not a conspirator?

7 MR. SCHACHTER: A conspirator --

8 THE COURT: On the hypothetical I put to you, the
9 coach is a conspirator and the object is to take the million
10 dollars out of the pocket of the university and put it into the
11 pocket of the coach. How about that?

12 MR. SCHACHTER: I think you have several problems.
13 First, I believe you still have a *Walters* problem because that
14 million dollars is not obtained through fraud. I guess we have
15 several problems. First of all, your Honor's hypothetical is
16 not anywhere close to what's in the indictment. Those are not
17 the allegations in the indictment.

18 THE COURT: Let's suppose this. Let's suppose the
19 government actually offered that kind of proof in this case.
20 It would be admissible under this indictment, wouldn't it?

21 MR. SCHACHTER: I believe it would be.

22 THE COURT: So do I. We don't know what the proof is
23 going to show. Maybe they are going to prove something like
24 that.

25 MR. SCHACHTER: The issue before us today, before your

Honor today is not what the evidence would show. We are looking at the four corners of the indictment. This indictment does not allege a scheme which has not run afoul of *Walters*. This indictment lays out a scheme to help, not to injure and, therefore, this indictment is inconsistent with the law. It does not constitute wire fraud.

To address your Honor's hypothetical, I would like to spend a little bit more time with it. First, it's not clear at all that that \$1 million would have been ill-gotten gains, although I haven't focused that hard on it, because I don't know what the allegations of such an indictment would look like and whether or not that would have been a scheme in order to procure that million dollars through the making of false statements, which, of course, wire fraud requires. So it is a little bit difficult to --

THE COURT: On that hypothetical, given the context we are talking about, the coach would be falsely certifying to the university compliance with the NCAA rules, which would have been violated.

MR. SCHACHTER: I can imagine a circumstance, with the hypothetical that your Honor laid out, could run afoul of the wire fraud statute. It depends on how it's alleged and what the facts are. It also might not. Those are not the facts alleged in this indictment.

THE COURT: An argument that such an indictment would

1 be insufficient on the theory that it was to help the
2 university, not hurt it, would be quite a stretch, wouldn't it?

3 MR. SCHACHTER: I am going to disagree there as well.
4 Because what *D'Amato* says, your Honor, in order to constitute
5 wire fraud, you need -- what the Court said specifically was
6 that the defendant cannot be found to be intending to harm an
7 entity when he engages in conduct that is otherwise lawful as
8 long as he is following the instructions of an appropriate
9 corporate agent, which the coach would be.

10 THE COURT: You are saying that if the bad guy is
11 following his own instructions and he's employed by the victim,
12 then the conclusion necessarily follows that the victim
13 authorized what happened.

14 MR. SCHACHTER: What *D'Amato* says, what the circuit
15 said is, the important issues are, is that corporate agent
16 unconflicted and acting in good faith.

17 THE COURT: Would it be your position that the coach,
18 who is party to a conspiracy to pay bribes in order to trigger
19 a payment from the university to him in circumstances where but
20 for the bribes he might not otherwise have been entitled to the
21 payment is unconflicted, acting in good faith? Are you kidding
22 me?

23 MR. SCHACHTER: The point, your Honor, I guess I'm
24 suggesting is that the circuit thought that the important
25 trigger between conduct that could be violative of the wire

1 fraud statute and conduct that is not is whether or not that
2 person is acting in the interests of the employer or is acting
3 for self-enrichment.

4 THE COURT: Is it in the interests of the employer on
5 my hypothetical to pay the million dollars in the circumstances
6 I've put to you? Isn't the corporation's interest to pay such
7 compensation as they have agreed to without improper conduct by
8 the coach?

9 MR. SCHACHTER: I guess what I'm saying, your Honor,
10 is that there would be a question to be analyzed as to whether
11 or not that presents a conflict of interest.

12 THE COURT: It would be a jury question, wouldn't it?

13 MR. SCHACHTER: Perhaps, if those facts were alleged.

14 THE COURT: Let's come a little closer to this case.
15 Don't these coaches all have economic and reputational
16 interests in putting the most winning teams they can on the
17 floor?

18 MR. SCHACHTER: Your Honor, I would submit that that
19 certainly makes sense. That's not alleged in the indictment.
20 I don't know. One can assume that those may be the facts.
21 Those are not the facts that are alleged in the indictment.
22 There is no suggestion that a grand jury considered such an
23 argument.

24 THE COURT: Wouldn't such evidence be admissible and
25 couldn't jurors reasonably find that?

1 MR. SCHACHTER: Well.

2 THE COURT: We all know, as a matter of common sense,
3 what this is all about, or at least part of what it's all
4 about, how the industry works. We do.

5 MR. SCHACHTER: Your Honor, be that as it may, I think
6 that we need to analyze what the indictment says these
7 defendants had as their goal, and there is nothing in the
8 indictment that suggests that the goal of these defendants was
9 to put money in the pockets of these coaches. It doesn't say
10 anything like that. It does not say that this was a scheme to
11 enrich college basketball coaches to the disadvantage, which
12 the Court of Appeals says in *Regent Office Supply* it's got to
13 be lining your own pocket to the disadvantage of the victims.
14 This indictment does not suggest that that is what was on the
15 minds of any of these defendants.

16 To the contrary, to the contrary -- and it's not just
17 one coach. It is, according to the indictment, multiple
18 coaches that said to these defendants, we really would like a
19 better basketball team. Can you please assist us.

20 And reading this indictment, what was on the minds of
21 these defendants was to help the victims, and that's not wire
22 fraud. This indictment does not lend itself to a suggestion
23 that the goal of these defendants was, we want to injure the
24 universities. We are out to get the universities. We want to
25 harm them. And that is in every single wire fraud case. There

1 are not wire fraud cases where people are even debating this
2 issue.

3 The government here has brought a wire fraud case
4 where, according to the grand jury's allegations, they thought
5 it was important to note that, in the words of the defendants,
6 this was a circumstance where they need to step up and help one
7 of their flagship schools. That is not wire fraud. The
8 Justice Department has not brought cases like that and this
9 indictment does not say, as your Honor's hypothetical lays out,
10 that, in fact, this would have been a scheme to line the
11 pockets of these coaches to the detriment of the universities.
12 There is nothing in this indictment that suggests that.

13 What is truly troubling is that they brought a theory
14 which is identical to one that the Seventh Circuit --

15 THE COURT: I've heard you say that quite a number of
16 times. The Seventh Circuit does not control my decision. Of
17 course I read it with respect, and I will do what I think is
18 appropriate.

19 MR. SCHACHTER: I understand that, your Honor.

20 THE COURT: I follow the law of this circuit.

21 MR. SCHACHTER: I understand that, your Honor, and I
22 would like the opportunity to address that. I will say that
23 the law of *Walters* is the law of this country and that is why
24 the United States Supreme Court said in *United States v.*
25 *Skilling* that wire fraud prohibits schemes in which "the

1 victim's loss of money or property supply the defendant's gain
2 with one the mirror image of the other." That does not fit
3 this indictment. Put more appropriately, this indictment runs
4 afoul of what the Supreme Court said in *Skilling* is the
5 hallmark of a wire fraud scheme.

6 And it's an intuitive hallmark. It is what everybody
7 thinks of when they think of wire fraud, that you are putting
8 money in your pocket to the disadvantage of somebody else. You
9 are taking money from a victim and you are sticking the money
10 in your pocket. That's wire fraud.

11 This indictment, this grand jury, they did not
12 conclude that that's what happened here. That is the law.
13 *Walters* is the law. Not just the Supreme Court says is the
14 law. The Supreme Court recently visited the definition of
15 obtain in *United States v. Loughrin* under the bank fraud
16 context, and this is a scheme to obtain money from the
17 victimized financial institutions. What the Supreme Court
18 said, that's what the word obtain means and, of course, that's
19 what the word obtain means. One need look no further than the
20 dictionary, and we quoted it to your Honor from back in 1909,
21 when the words obtain were added to the wire fraud statute, and
22 they mean the same thing today.

23 THE COURT: Mr. Schachter, I appreciate this is a case
24 of great immediate interest, but a jury argument is not all
25 that helpful.

1 MR. SCHACHTER: I understand, your Honor, and I
2 apologize if I'm exercised. But this case from the moment that
3 I read the indictment -- I apologize, your Honor. I will try
4 to focus on the legal argument.

5 The definition of obtain has a dictionary definition
6 and it is to get hold of by effort. And that means that the
7 government, in order to bring a wire fraud case, needs to show
8 that what was on these defendants' minds, the indictment needs
9 to be alleged more precisely, the grand jury must have found
10 more precisely that what was on these defendants' minds is that
11 they want to get hold of money or property from the victims.

12 THE COURT: Their students or their families wish to
13 get athletic scholarships from the victims.

14 MR. SCHACHTER: The students did.

15 THE COURT: Or families, right?

16 MR. SCHACHTER: That's not what the indictment says.

17 THE COURT: It says family and/or students or students
18 and/or families. That's what it says.

19 MR. SCHACHTER: Paragraph 36 of the indictment says
20 that the scholarships went to the students. There is no
21 allegation that the scholarships --

22 THE COURT: Of course they did. Of course they did.
23 I've actually read the indictment.

24 MR. SCHACHTER: Of course, your Honor.

25 THE COURT: Carefully.

1 MR. SCHACHTER: Of course. It does not allege any
2 financial benefit to the families. I understand that the
3 families may be happy that their sons received scholarships
4 from the universities, but that's not money or property.

5 And the indictment, in order to run afoul of the wire
6 fraud statute, the grand jury must have found that this was a
7 scheme by the defendants to obtain, or potentially a scheme
8 participant, to obtain money or property from the universities,
9 and the indictment does not say that.

10 Your Honor, the government doesn't cite not a single
11 case that looks like this. The government does not cite a
12 single case in which the indictment is so replete with
13 allegations that the purpose of their activity is to assist.
14 More importantly, the government does not cite a single case --

15 THE COURT: How about *United States v. Gray*?

16 MR. SCHACHTER: Your Honor, *United States v. Gray*.

17 THE COURT: Which basketball coaches at Baylor were
18 convicted for arranging for recruits to get fake academic
19 credits so that they could play for the Baylor basketball team.
20 How about that one?

21 MR. SCHACHTER: Your Honor, *United States v. Gray* was
22 an honest services case. The Fifth Circuit in *United States v.*
23 *Gray* specifically said that the only way that that case could
24 be sustained was because of Section 1346, that the theory
25 there, and it's the grounds of the Fifth Circuit's decision,

1 was that what the coaches were doing there is, they were
2 breaching their fiduciary duties to Baylor University. That's
3 the gravamen of the fraud.

4 In distinguishing *Walters*, the Fifth Circuit
5 specifically said the difference here is, that wasn't an honest
6 services case. 1346 had not yet been passed at the time that
7 *Walters* was decided.

8 This case, this was a 1346 case. The scheme was to
9 deprive Baylor of the honest services of its employees.
10 Therefore, there was a breach of fiduciary duty which at that
11 point in time was sufficient to make out an honest services
12 fraud case. The government has not charged honest services
13 fraud here, nor could they, because *United States v. Skilling*
14 subsequently said, that theory that was laid out in *Gray*,
15 that's not honest services fraud because honest services fraud
16 requires a bribe or kickback. It shows just how far afield the
17 government has strayed from established jurisprudence because
18 the case that they so heavily relied on, *United States v. Gray*,
19 is a case that is under a completely different theory, 1346,
20 not charged here, and it is conduct which the Supreme Court
21 said is not unlawful. *Skilling* has reversed *Gray*.

22 THE COURT: If you have other points you want to
23 address, you might get to them.

24 MR. SCHACHTER: First, your Honor, I would like to
25 address the government's points under *Walters*. They tried to

1 distinguish *Walters*. They make two arguments. First, they say
2 that this case is distinguishable because scheme participants
3 obtained money. In fact, there are two issues with that.

4 First, there are two schemes that are alleged here, a
5 Louisville scheme and a Miami scheme. And with respect to the
6 Miami scheme, we now know that the scheme participants received
7 nothing at all because with respect to Miami --

8 THE COURT: We now know how? We know that because
9 it's alleged in the indictment or you got that from some
10 newspaper or otherwise?

11 MR. SCHACHTER: From the government's disclosure.
12 They disclosed that, in fact, Brad Augustine --

13 THE COURT: I hate to put this to you, I'm not
14 considering whatever might be in the disclosure, nor am I
15 considering anything else outside the indictment.

16 MR. SCHACHTER: With respect --

17 THE COURT: You have no summary judgment in this case.

18 MR. SCHACHTER: Of course not, your Honor. *Walters*,
19 your Honor, is the law of this circuit.

20 THE COURT: *Walters* is the law of the Seventh Circuit,
21 not the Second Circuit.

22 MR. SCHACHTER: What I meant to say, your Honor, is
23 the principle that's laid out in *Walters*, that wire fraud
24 requires a transfer from the pockets of the defendant to the
25 pockets of the victim, is the law of this circuit as well. I

1 point to *Skilling*, I point to *Loughrin*, and I also point out --

2 THE COURT: From the defendant to the victim? Did I
3 hear you correctly?

4 MR. SCHACHTER: I'm sorry. I reversed that. What I
5 meant, your Honor, of course, from the pockets of the victim to
6 the pockets of the defendant. And that's why *Regent Office*
7 *Supply* says that the defendants must be acting to their own
8 advantage. It's why in *United States v. Starr* the Second
9 Circuit said that the purpose of the scheme must be to garner
10 some benefit and cause harm, why *United States v. Carlo* says
11 that wire fraud is a scheme to obtain money or property by
12 means of a scheme that also contemplated harm. And Judge
13 Parker in *Laurenson* said that wire fraud only exists when a
14 schemer is appropriating a benefit and there is a corresponding
15 loss.

16 All of these cases are saying exactly what the Supreme
17 Court said in *Skilling*, which is that money or property wire
18 fraud, in contrast to honest services fraud, money or property
19 fraud requires a scheme in which the victim's loss of money
20 supplied the defendant's gain. That is a flaw that this
21 indictment has.

22 This indictment simply does not allege that the
23 victim's loss of money or property that these scholarships
24 supplied the defendants' gain with one being the mirror image
25 of the other, and the only cases that the government has to

1 cite are cases that are completely beside the point. They rely
2 on *Gray*, which is an honest services case which, your Honor,
3 the Supreme Court said is distinguishable for money and
4 property fraud. In honest services fraud it does not require
5 that transfer from the victim to the defendant. That's what
6 *Skilling* is addressing when it lays out the requirements of
7 wire fraud.

8 The government focuses on language from *Finazzo* and
9 *Porcelli*. Your Honor, I submit that if one gives those cases a
10 careful read, they do not intend to read out of the wire fraud
11 statute the word obtain.

12 What they are addressing, both of those cases, is
13 whether or not the defendant contemplated harm, which is a
14 separate requirement. Wire fraud requires two things. It
15 requires that the defendant be scheming to obtain money or
16 property from the victim and, separately, it requires that the
17 defendant contemplate, which the Second Circuit has said means
18 intends, harm to the victim. It requires those two things.

19 In *Porcelli* a, the Second Circuit said, over and over
20 again as it reviewed the multiple appeals that Mr. Porcelli
21 brought, it noted over and over again the defendant obtained
22 money. That wasn't the issue that they were addressing. In
23 *Porcelli* 1, the Second Circuit said, Porcelli, quote, obtained
24 cash. Jump cite of that is 1359 to 60. It noted, if he did
25 not collect the tax, then he obtained funds that an honest

1 retailer selling for the same price would have remitted to the
2 state. If he did collect the tax but failed to remit, then, of
3 course, he obtained money and surely deprived the state.

4 The Second Circuit noted that Porcelli gained
5 something tangible. There was no question that Mr. Porcelli
6 obtained money or property. The question was, and this is the
7 words of the Second Circuit, but did Porcelli deprive New York
8 of its property. It was addressing the second element, whether
9 or not the defendant contemplated harm. The issue was never
10 whether or not Porcelli obtained money. He obtained money.

11 Similarly, in *Finazzo*, there is no question that
12 Mr. Finazzo obtained money from the victim. He was getting
13 kickbacks. He received \$25 million from Aeropostale's
14 payments. He obtained money or property. The issue in *Finazzo*
15 was whether or not the deprivation was sufficient. The
16 separate element about whether or not the defendant
17 contemplated economic harm to the victim is what the Court was
18 addressing.

19 It's for that reason, your Honor, that we say that the
20 rule that's laid out in *Walters* is the rule that's laid out
21 throughout the Second Circuit's decisions and, also, as we
22 note, it's the law of the circuit where Mr. Gatto resides, the
23 Ninth Circuit, as well --

24 THE COURT: That has got absolutely nothing to do with
25 this, does it?

1 MR. SCHACHTER: I think it poses a significant due
2 process issue, a real notice issue.

3 THE COURT: I am sure if there is a conviction you
4 will raise it.

5 MR. SCHACHTER: Your Honor, may I have a moment.

6 THE COURT: Yes.

7 MR. SCHACHTER: Thank you, your Honor. Unless the
8 Court has any additional questions about our arguments.

9 THE COURT: No. Thank you.

10 Any further argument on the defense side?

11 MR. MOORE: None from Mr. Code, your Honor.

12 MR. HANEY: None on behalf of Mr. Dawkins. Thank you,
13 your Honor.

14 THE COURT: Let me hear from the government.

15 MR. DISKANT: Your Honor, I think, from the
16 government's perspective, the Court is seeing these issues
17 correctly that many of the arguments made by Mr. Schachter and
18 the defendants either mischaracterize the allegations in the
19 indictment or turn on factual issues that can't possibly be
20 resolved at the motion to dismiss stage because there is no
21 evidence in this case.

22 We, in particular, dispute his characterization of the
23 indictment's allegations about the intent to harm rather than
24 help the universities, and we think the Court is absolutely
25 right to point out that there are myriad instances in which

1 fraud cases are brought in which an insider is alleged to be
2 involved, and this is one of those cases.

3 We believe that we have fully and fairly alleged a
4 scheme to defraud on two different theories, both the direct
5 tangible harm as well as the intangible right to control
6 theory. We believe the indictment is sufficient and meet its
7 requirements.

8 Unless the Court has other questions from the
9 government, we are prepared to rest on our submission.

10 THE COURT: Thank you.

11 Anything else, Mr. Schachter?

12 MR. SCHACHTER: No, your Honor. Thank you.

13 THE COURT: It's my intention to deny this motion. In
14 the event of a conviction, and perhaps, in any case, I will
15 write on it, but I do not find the arguments made by the
16 defendants at all persuasive.

17 I will just make a couple of comments on this theory
18 that there can be no mail fraud because the goal here was to
19 help rather than hurt the alleged victims, the universities.

20 The indictment alleges, first, that the defendants and
21 their coconspirators, the coconspirators including the
22 prospective basketball players and/or their family members, and
23 coaches -- not all coaches, but certain coaches -- conspired to
24 obtain athletic-based financial aid for attractive basketball
25 prospects.

1 The indictment alleges, also, that the objects of the
2 conspiracy included "causing the universities to agree to
3 provide athletic scholarships to student athletes who were
4 ineligible to compete as a result of" bribes paid as part of
5 the conspiracy.

6 Those allegations alone, in my view, the truth of
7 which I'm obliged to accept for purposes of this motion, are
8 fatal to at least this part of the defendants' motions.

9 The argument that in substance those allegations
10 should be ignored because payments to some of these prospects
11 or their families were intended to assist one or more of the
12 coaches in getting the prospects to their schools, that the
13 plan to funnel money to a particular prospect at Louisville was
14 developed "at the request and with the assistance of one or
15 more coaches," and that defendant Gatto told defendant Code
16 that he already had learned about a request by a coach at the
17 University of Miami about a request by Miami for assistance in
18 securing a particular player, is exceptionally unpersuasive.

19 The indictment alleges with great clarity that the
20 NCAA rules prohibited the payments. It alleges that the
21 coaches and other conspirators concealed the bribes from the
22 universities in order for the scheme to succeed and to obtain
23 the scholarships and it alleges that the universities stood to
24 suffer substantial penalties if the payments were uncovered.
25 I'm obliged to assume all those facts.

Moreover, the jury would be entitled to hear evidence which, if believed, would warrant a conclusion that the coaches were not acting in the sole interests of the schools that employ them. The government would be entitled to prove that the coaches had substantial personal interests, reputational, financial, career, and possibly other interests in putting winning teams on the floor and that those interests were not completely aligned with the interests of their employers.

In other words, it is conceivable that the proof will show that the coaches' motives were partly, or even entirely, though that seems doubtful, selfish, that their motives were mixed; in a sense, their motives may have been to help the schools in the sense that, all other things being equal, the schools would like to have the most winnings teams that they can have. But their interests may also have been in conflict with the interests of the schools because it subjected them to the risk of penalties.

Had the fact been fully disclosed, and the indictment alleges that they were not, it's entirely possible that the universities would never have permitted what went on here. To say in those circumstances that the goal, the singular goal here was to help the universities is naive and just not warranted, at least at this stage of the case, however powerful a jury argument it might turn out to be at trial.

The Second Circuit, I believe, in *D'Amato*, wrote that

1 the principle that directors and officers may act on behalf of
2 a corporation does not extend to acts of self-enrichment. So
3 the attempt to equate the actions and statements of the coaches
4 who, after all, are alleged to be parties to an illegal
5 conspiracy here, with the actions of their employers, is, at
6 best, premature.

7 What the evidence will show at trial remains to be
8 seen, but that's where we are going here. This motion is very,
9 very likely -- it is now denied. I will enter a written order.
10 As I said, I may write on it in more detail.

11 Certainly, I've had the benefit of extremely thorough
12 briefing. I've considered this carefully. But that's where I
13 come out, in part for the reasons that I've rather informally
14 sketched in these oral remarks, which may turn out to be
15 revised when I write, but that's the way I see it this morning.
16 I'm sufficiently confident of the bottom line, that the motion
17 is denied.

18 Anything else?

19 MR. SCHACHTER: Nothing for Mr. Gatto, your Honor.

20 MR. DISKANT: Nor from the government.

21 THE COURT: Thank you.

22 o0o